

**IN THE INCOME TAX APPELLATE TRIBUNAL "D", BENCH MUMBAI  
BEFORE SHRI SAKTIJIT DEY, JUDICIAL MEMBER**

**&  
SHRI G. MANJUNATHA, ACCOUNTANT MEMBER**

**ITA No.7224/Mum/2018  
(Assessment Year :2009-10)**

Madhav N. Bhatkuly 1501/02/03 Raheja Empress 392, Veer Savarkar Marg Prabhadevi Mumbai-400 006	Vs.	ACIT, Circle-19(2) Room No.207, 2 <sup>nd</sup> Floor Matru Mandir, Tardeo Mumbai-400 007
<b>PAN/GIR No.AAAPB7378J</b>		
<b>Appellant)</b>	<b>..</b>	<b>Respondent)</b>

Revenue by	Shri Kamal Mangal, JCIT-DR
Assessee by	Shri Jitendra Singh, AR
<b>Date of Hearing</b>	<b>16/01/2020</b>
<b>Date of Pronouncement</b>	<b>22/01/2020</b>

**आदेश / O R D E R**

**PER G.MANJUNATHA (A.M):**

This appeal filed by the assessee is directed against order of the Ld. Commissioner of Income Tax (Appeals)-55, Mumbai, dated 27/11/2018 and it pertains to Assessment Year 2009-10.

2. The assessee has raised the following grounds of appeal.

*The Ld, Commissioner of Income Tax (Appeals) - 55, Mumbai [hereinafter referred to as the "Ld- CIT(A)"] erred in passing the order dated 27.11-2018 upholding the penalty order passed by Ld, Assistant Commissioner of Income Tax, Circle - 19(2), Mumbai [hereinafter referred to as "Ld. A.O"] levying concealment penalty of Rs.2,73,256/-without appreciating the facts and circumstances of the case. Thus, the order dated 27.11.2018 passed by Ld. CIT(A) is bad in law and the same may be quashed.*

**2. Notice issued under section 271(1)© of the Act without recording any satisfaction is bad in law**

i. The penalty notices dated 25.11.2011 and 20.03.2017 issued under section 274 r.w.s 271 of the Income Tax Act, 1961 [hereinafter referred to as "the Act"] is void ab initio as the same is not discernable whether the penalty proceedings are initiated for concealment of income or furnishing of inaccurate particulars of income. Hence, the notices issued under section 274 r.w.s 271 of the Act and the subsequent penalty order passed under section 271(l)(c) of the Act are bad in law and the same may be quashed.

ii. The penalty order dated 31.03.2017 passed under section 271(1)(c) of the Act is bad in law as the penalty has been levied on the basis of both the limbs which is not permissible as per the provisions of section 271(1)(c) of the Act. Thus, the penalty order passed under section 271(1)(c) of the Act is bad in law and the same may be deleted.

**Levy of concealment penalty on denial of set off of business loss against salary income unjustified - Rs.2,73,256/-**

- i. The Ld. CIT(A) erred in confirming the action of the A.O. in levying concealment penalty of Rs.2,73,256/- on denial of benefit of set off business loss against salary income without appreciating the fact and circumstances of the case. The Appellant, therefore, prays that levy of concealment penalty under section 271(l)(c) of the Act on the above disallowance is not at all justified and the same may be deleted.
- ii. The Ld. CIT(A) failed to appreciate that the Ld. A.O. has denied the set off of business loss against salary income merely on the basis of difference of opinion on the same set of facts. Thus, the Appellant has neither concealed any particulars of his income nor furnished any inaccurate particulars of income. The Appellant, therefore, prays that levy of concealment penalty amounting to Rs.2,73,256/- is unjustified and the same may be deleted.
- iii. The Ld. CIT(A) failed to appreciate that the Appellant has given bonafide explanation with respect to set off of business loss against salary income; which has not been found to be false. Thus, levy of concealment penalty amounting to Rs.2,73,256/- is unjustified and the same may be deleted.
- iv. Without prejudice to above, the excess of assessed income of Rs.48,05,572/- over returned income of Rs.43,90,290/- is Rs.4,15,290/- only whereas the Ld. A.O. has levied penalty on assessed income of Rs.8,34,324/- without considering the order passed by Ld. CIT(A) in quantum proceedings. Thus, the A.O. while levying the penalty has ignored the explanation 4 to section 271(l)(c) of the Act Hence, levy of concealment penalty of Rs.2,73,256/- is unjustified and the same may be deleted.

4. *The Appellant craves leave to add, alter, rescind or amend any of the above grounds of appeal.*

3. The brief facts of the case are that the assessee has filed its return of income for the AY 2009-10 on 30/07/2009, declaring total income at Rs. 43,90,280/-. The assessment has been completed u/s 143(3) of the I.T.Act, 1961 on 25/11/2011, determining the total income at Rs. 48,05,570/- after making disallowances of brought forward business loss against income under the head income from salary. Thereafter, the Ld. AO has initiated penalty proceedings u/s 271(1)(c) of the I.T.Act, 1961 and after considering relevant submissions of the assessee levied penalty of Rs. 2,73,256/-, which is equal to 100% of the tax sought to be evaded. The assessee carried the matter in appeal before the first appellate authority, but could not succeed. The Ld. CIT(A), for the detailed reasons recorded in his appellate order, dated 27/11/2018, dismissed appeal filed by the assessee and confirmed penalty levied on disallowances of set off of brought forward business loss against income assessable under the head salaries. Aggrieved by the Ld.CIT(A) order, the assessee is in appeal before us.

4. The Ld. AR for the assessee submitted that the Ld.CIT(A) was erred in confirmed penalty levied u/s 271(1)(c) without considering the fact the Ld. AO has not recorded any satisfaction before initiation of penalty proceedings u/s 271(1)(c), whether said penalty proceedings has been initiated for concealment of particulars of income or for furnishing inaccurate particulars of income. The Ld. AR, further submitted that if, you go through the assessment order passed by the Ld. AO, it is very clear from the assessment order that

the Ld. AO has not arrived at satisfaction before initiation of penalty proceedings , which is evident from the fact that the Ld. AO has merely stated that penalty proceedings u/s 271(1)(c) of the Act, are separately initiated . This lapse continued, even in notice issued u/s 274 r.w.s. 271 of the I.T.Act, 1961, dated 25/11/2011 and 20/03/2017, where the Ld. AO has issued printed notice without striking off in applicable portion in the notice. From this, it is very clear that the satisfaction of the Ld. AO is not discernable, whether the penalty proceedings are initiated for concealment of income or furnishing of inaccurate particulars of income. Further, even in penalty order, the Ld. AO has clearly not specified about the limb under which penalty is proposed to be levied ,which is evident from the fact that the Ld. AO has clearly stated that the assessee has concealed his income and submitted inaccurate particulars of income. Any penalty proceedings initiated consequent to invalid notice is *void ab-initio* and consequently, the penalty levied u/s 271(1)(c) of the I.T.Act, 1961 cannot be sustained.

5. The Ld. DR, on the other hand, strongly supporting order of the Ld.CIT(A) submitted that it is a clear case of concealment of particulars of income, because the assessee has claimed ineligible brought forward business loss against income assessable under the head income from salary, even though the provision of section 71(2A) clearly barred such claim by any person. The Ld. AO, as well as the Ld.CIT(A) had recorded categorically findings to arrive at clear finding that it is a pit case for levy of penalty for concealment of particulars of income and hence, there is no reason to interfere with order of the Ld.CIT(A).

6. We have heard both the parties, perused the materials available on record and gone through orders of the authorities below. It is an admitted position of law that before initiation of penalty proceedings u/s 271(1)(c), the Ld. AO shall arrive at a clear satisfaction as to whether, such penalty proceedings are being initiated for concealment of particulars of income or for furnishing inaccurate particulars of income. If, the Ld. AO has not records clear satisfaction as required under the law, either in assessment proceedings or at the time of issuing show cause notice u/s 274 r.w. 271(1)(c), then the whole penalty proceedings, consequent to incorrect satisfaction or for non satisfaction becomes *void ab-initio*. Further, it is also a settled position of law that the Ld. AO has to categorically specify the limb under which, the penalty proceedings has been initiated. If penalty proceedings, is initiated for one limb and levied for different limb, then the whole penalty proceedings, becomes invalid and *void ab-initio*. This legal proposition is supported by the decision of Hon'ble e Bombay High Court, in the case of CIT vs Samson Perinchery in ITA No. 1154/Mum/2015, dated 05/12/2017. This legal proposition is further supported by the decision of Hon'ble Supreme court, in the case of CIT vs M/s SSA's Emerald Meadows (2016) 242 Taxmann 180 (SC), where the Hon'ble Supreme court has upheld the decision of Hon'ble Karnataka High Court, in the case of CIT vs. Manjunatha cotton & Ginning Factory (2013) 359 ITR 565. In this case, on perusal of assessment order, as well as penalty order , it is very clear from the records that the Ld. AO has not arrived at clear satisfaction as required under the Act, even in assessment order and said lapses is continued in show cause notice issued us 274 r.w.s. 271(1)(c) of the I.T.Act, 1961. Further, even in penalty order, the Ld. AO has not

arrived at clear satisfaction, which is evident from the fact that he has concluded his penalty proceedings and levied penalty u/s 271(1)(c) on both limbs. From the above, it is very clear that the satisfaction required to be recorded before initiation of penalty proceedings u/s 271(1)(c) is not discernable, whether the penalty proceedings are initiated for concealment of particulars of income or furnishing of inaccurate particulars of income, either in assessment order or in the show cause notice issued for levying penalty. Therefore, we are of the considered view that the penalty proceedings initiated u/s 271(1)(c) of the Act, consequent to vague notice is *void ab initio* and liable to be quashed. Therefore, we direct the Ld. AO to delete penalty imposed u /s 271(1)(c) of the I.T.Act, 1961

7. In the result, appeal filed by the assessee is allowed.

Order pronounced in the open court on this 22 /01/2020

**Sd/-**  
**(SAKTIJIT DEY)**  
JUDICIAL MEMBER

**Sd/-**  
**(G. MANJUNATHA)**  
ACCOUNTANT MEMBER

Mumbai; Dated : 22/01/2020

Thirumalesh Sr.PS

**Copy of the Order forwarded to :**

1. The Appellant
2. The Respondent.
3. The CIT(A), Mumbai.
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

BY ORDER,

सत्यापित प्रति //True Copy//

(Asstt. Registrar)  
ITAT, Mumbai